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In the Supreme Court

OF THE

United States

OCTOBER TERM, [redacted] 1952

No. 159

FREDERICK CHARLES WITT,
Petitioner,

vs.

UNITED STATES OF AMERICA,
Respondent.

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for
the Ninth Circuit
AND
BRIEF IN SUPPORT THEREOF.

HYMAN M. GREENSTEIN,
408 National Building, Honolulu, Hawaii,
Attorney for Petitioner.

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No.

FREDERICK CHARLES WITT,	*Petitioner,*
VS.	
UNITED STATES OF AMERICA,	*Respondent.*

PETITION FOR WRIT OF CERTIORARI
to the United States Court of Appeals for the Ninth Circuit.

To the Honorable Fred M. Vinson, Chief Justice of the United States, and to the Honorable Associate Justices of the Supreme Court of the United States:

The petition of Frederick Charles Witt for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit respectfully shows:

THE INDICTMENT, SENTENCE, ETC.

Petitioner was indicted (R. 3) for violation of Section 641, Title 18, United States Code, in a single count as follows:

> "That on or about December 26, 1950, at the Pearl Harbor Navy Yard, City and County of Honolulu, Territory of Hawaii, and within the jurisdiction of this Court, Frederick Charles Witt did knowingly, wilfully, unlawfully and feloniously embezzle, steal, purloin and knowingly convert to his use and the use of another, certain property and things of value of the United States, to-wit, 24 diesel engine parts of the total value of $321.02, in violation of Section 641, Title 18, United States Code."

After trial by jury, the jury found petitioner guilty as charged (R. 4); and judgment was entered adjudging the defendant guilty of the offense of "knowingly, wilfully, unlawfully, and feloniously embezzling, stealing, purloining and knowingly converting to his use and the use of another certain things of value of the United States" etc.

Imposition of the sentence was suspended, and petitioner placed on probation for a period of two years and fined the sum of $500.00. (R. 5-6.)

A motion for a new trial was made and denied. (R. 6-8.)

SUMMARY AND SHORT STATEMENT OF QUESTIONS INVOLVED.

On the 14th day of March, 1951, an indictment was returned in the United States District Court for the District of Hawaii, charging petitioner with violating Section 641, Title 18, United States Code, alleging that petitioner did "knowingly, wilfully, unlawfully and feloniously embezzle, steal, purloin and knowingly convert" government property of the value of $321.02.

The jury found the petitioner guilty "as charged".

During the course of the proceedings an alleged confession was admitted into evidence over objection of petitioner. Testimony as to the voluntary aspect of the confession was adduced in the jury's absence; but thereafter petitioner was refused permission to take the stand in the jury's presence for the limited purpose of testifying as to the involuntary aspect of the confession.

In the U. S. Court of Appeals, petitioner urged that the verdict, judgment and sentence were null and void and of no force and effect in that there is no such offense as embezzling, stealing, purloining *and* converting to his own use government property, on the following grounds:

(a) It does not clearly appear of what crime or crimes petitioner was found guilty;

(b) Petitioner, by said verdict and judgment was adjudged guilty of inconsistent crimes as to the same transaction;

(c) There is no such offense.

Although this latter question was not raised in the trial Court, it *was* made a point on appeal, and *was* considered by the Court of Appeals.

The judgment of conviction was affirmed by the Court of Appeals for the Ninth Circuit.

JURISDICTIONAL STATEMENT.

1. Jurisdiction of the Court.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

2. The decision and judgment of the Court of Appeals.

The decision and judgment of the Court of Appeals was rendered April 29, 1952. (R. 219-223.)

(a) The Court of Appeals' decision that a defendant in a criminal case may not take the stand in the presence of the jury for the limited purpose of testifying as to the involuntary aspect of the taking of an alleged confession is in direct conflict with the decisions of this Court in *Wilson v. United States,* 162 U.S. 613, 40 L. Ed. 1090, 16 S. Ct. 895; and *United States v. Carignan,* 96 L. Ed. 57. That if your petitioner is mistaken as to the direct applicability of these cases to the question raised, then it is respectfully submitted that the question raised is one which involves a decision on an important question of federal law which has not clearly been, but which should be settled by absolute decision of this Supreme Court.

Under either of such circumstances this Court has jurisdiction on *certiorari* to review the action of the

lower Court. (*Dept. of Treasury v. Ingram-Richardson Mfg. Co.,* 313 U.S. 252, 85 L. Ed. 1313; *Federal Trade Comm. v. Raladam Co.,* 316 U.S. 149, 96 L. Ed. 1336.)

(b) The Court of Appeals' decision that a defendant in a criminal case may be found guilty upon a general verdict of guilty as charged, of offenses which are inconsistent crimes, though couched in the language of the statute presents a decision on an important question of federal law which has not been but which should be settled by the Supreme Court. The Supreme Court case of *Crain v. United States,* 162 U.S. 625, relied upon by the Court of Appeals is not a case in point—for here, the indictment in a single count charged separate, distinct, and *inconsistent* substantive crimes.

THE QUESTIONS PRESENTED.

The questions presented and raised by this petition are as follows:

1. Where the voluntary aspect of an alleged confession is in issue, can a trial judge refuse the defendant permission to take the stand in the presence of the jury for the express limited purpose of testifying as to the involuntary aspect of the taking of the confession?

2. Where a defendant in a single count is charged in the language of the statute of committing separate, distinct, and *inconsistent* crimes, will not a general

verdict of guilty as charged, and a judgment that the defendant is guilty of "the offense of knowingly, wilfully, unlawfully and feloniously embezzling, stealing, purloining *and* knowingly converting to his use and the use of another" government property, be null and void for uncertainty and, adjudging the defendant guilty of something which is not an offense, and of inconsistent offenses?

POINTS RELIED UPON FOR THE ISSUANCE OF A WRIT OF CERTIORARI.

The Writ of *Certiorari* prayed for herein should issue for each and all of the following reasons:

1. The Court of Appeals has ruled in effect that a trial judge may prevent the issue of the involuntary aspect of the taking of an alleged confession from reaching the jury by refusing to permit a defendant to testify in its presence for that limited purpose. This is in conflict with decisions of this Court and is a marked departure from the accepted and usual course of judicial proceedings.

2. The Court of Appeals has ruled in effect that one may be guilty of the offense of embezzling, stealing, purloining *and* converting the same item of government property. We submit there is no such offense and that such a judgment is null and void. This presents a new and important question of federal law and interpretation of a federal criminal statute. The case of *Crain v. United States* (supra) should be distinguished, or reexamined, and the rule therein set

forth abrogated or restricted to offenses not inconsistent with each other.

Wherefore, petitioner respectfully submits that this Honorable Court issue a Writ of *Certiorari* to the United States Court of Appeals for the Ninth Circuit, to the end that the questions involved may be fully presented and argued and justice done in the premises.

Dated, Honolulu, Territory of Hawaii,
June 25, 1952.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Petitioner.

CERTIFICATE OF COUNSEL.

I hereby certify that I am a member of the bar of the Supreme Court of the United States and that I am counsel for the petitioner in the above entitled cause and that, in my judgment, the foregoing petition is well founded in point of law as well as in fact and that said petition is not interposed for delay.

Dated, Honolulu, Territory of Hawaii,
June 25, 1952.

HYMAN M. GREENSTEIN,
Attorney for Petitioner.

In the Supreme Court
OF THE
United States

OCTOBER TERM, 1951

No.

FREDERICK CHARLES WITT, *Petitioner,*

vs.

UNITED STATES OF AMERICA, *Respondent.*

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

THE OPINIONS AND JUDGMENT OF THE COURTS BELOW.

The judgment of the trial Court was rendered and filed on May 18, 1951. (R. 5-6.)

The judgment and opinion of the Court of Appeals was rendered and filed on April 29, 1952. (R. 219-223.)

JURISDICTION.

The jurisdiction of this Court is invoked under Title 28, U.S.C., Section 1254 (1).

The basis on which it is contended this Court has jurisdiction and cases in support thereof are fully set forth in the foregoing petition.

STATEMENT OF THE CASE.

Petitioner was indicted in a single count (R. 3) for violating Section 641, Title 18, United States Code, as fully set forth in the foregoing petition.

He was charged conjunctively in the language of the statute. The evidence adduced dealt with only one transaction. The verdict of the jury was "guilty as charged". (R. 4.) Petitioner was adjudged guilty of the offense of "embezzling, stealing, purloining and knowingly converting to his own use" government property of the value of $321.02. (R. 5.)

SPECIFICATION OF ERRORS RELIED UPON.

1. The opinion of the Court of Appeals is in error in holding that petitioner was not denied the right to take the stand in the jury's presence for the limited purpose of testifying as to the involuntary aspect of the taking of the confession.

2. The opinion of the Court of Appeals is in error in holding that a defendant in a criminal trial cannot take the stand in the presence of the jury with the

express purpose of *limiting* his testimony to the involuntary aspect of the taking of a confession.

3. The opinion of the Court of Appeals is in error in holding in effect that a judgment of conviction of the offense of embezzling, stealing, purloining and converting, is a valid judgment.

ARGUMENT.

I. THE COURT OF APPEALS ERRED IN HOLDING THAT PETITIONER WAS NOT DENIED THE RIGHT TO TAKE THE STAND IN THE PRESENCE OF THE JURY FOR THE LIMITED PURPOSE OF TESTIFYING TO THE INVOLUNTARY ASPECT OF THE TAKING OF THE CONFESSION.

During the course of the trial there was admitted into evidence a confession taken from the defendant. (R. 171.) Prior to its admission into evidence testimony was adduced *outside* the presence of the jury. Both the FBI agent who procured the confession and the petitioner testified as to the voluntary or involuntary aspects. (R. 107-168.)

Following introduction into evidence of the confession of petitioner, the same was read into the record in the presence of the jury. (R. 172-175.)

Petitioner thereafter, requested the trial Court to permit him to testify in the presence of the jury, for the limited purpose of testifying as to the involuntary aspect of the taking of the confession. The trial Court denied this request, stating that "well you have had him on the stand". (R. 194.)

During the course of the hearing on the question as to the admissibility of the confession, outside the presence of jury, petitioner inquired whether he would be accorded the privilege of producing the same evidence before the jury. The trial Court ruled "No". (R. 168.)

A reading of the record clearly shows that petitioner was in point of fact denied the right to take the stand for the purpose of testifying as to the voluntary aspect of the taking of the confession.[1]

The Court of Appeals held that it did "not so understand the record". Such a holding is not supported by the record of the trial Court.

II. THE COURT OF APPEALS ERRED IN HOLDING THAT A DEFENDANT IN A CRIMINAL TRIAL CANNOT TAKE THE STAND IN THE PRESENCE OF THE JURY FOR THE EXPRESS LIMITED PURPOSE OF TESTIFYING AS TO THE INVOLUNTARY ASPECT OF THE TAKING OF A CONFESSION.

The opinion of the Court of Appeals is a ruling in effect that a defendant in a criminal trial cannot take the stand in the presence of the jury for the express limited purpose of testifying as to the involuntary aspect of the taking of a confession.

This ruling is contrary to well-established rights under the Constitution of the United States as well

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[1]The entire portion of the record of trial relating to this request to put petitioner on the stand in the presence of the jury for the limited purpose of testifying as to the involuntary aspect of the taking of the confession is set forth in the Appendix below.

as constituting a marked departure from the accepted and usual course of our judicial proceedings, guaranteeing unto a defendant in a criminal trial his fair day in Court, and due process of law.

> "The law and practice are that the trial court should, in the absence of the jury, first hear the evidence upon the prima facie case, when the legality and voluntariness of the confession are brought into question * * * When the court is satisfied that the government has made a prima facie case, making for admissibility; that is when the evidence discloses that the confession was made without duress, or violence, promises, or threats, but voluntarily, the jury is called in and the evidence as to the facts and circumstances of the procurement of the confession is heard by the jury. Evidence contra is, in the course of the trial offered by the defendant, and the confession having been admitted on the court's personal finding of the prima facie admissibility, is read or detailed to the jury by the witnesses; leaving to the jury, by an appropriate charge, the question as to whether it was in fact unlawfully obtained, or that duress, force, threats, or promises were employed, had, or made in its obtention.
>
> Obviously, the hearing of the prima facie case and of the confession in the presence of the jury ordinarily is error, when the trial court finds that it was not lawfully obtained and then excludes it. The harm has already been done. In taking this method of hearing the evidence making for admissibility in permitting the jury to hear the confession in a case where the facts, as matters of law, may render the confession inadmissible, the trial court acts, in a way, at his peril. If it turn

> out that he ruled right in deeming it admissible, no harm has been done. If he rules wrong, i.e., finds it inadmissible, error has been committed."
>
> *Ramsey v. U. S.*, 33 F. (2d) 699, 700.[2]

The failure of the Court to permit petitioner to give evidence before the jury on the limited question as to the voluntary aspect of the taking of the confession constitutes a violation of petitioner's rights and was highly and substantially prejudicial and harmful so as to make imperative a reversal of the verdict and judgment of the court below.

During the course of the hearing relative to the question as to the admissibility of the confession, counsel for petitioner not only asked whether or not the Court would accord petitioner the privilege of testifying thereon but did explicitly and in substance inform the Court of the procedure, which was in accordance with the rule as expressed in the *Ramsey* case, supra. (R. 168-169.) Following this statement of counsel, the Court ruled, "No, that is new to me." (R. 169.)

The law is well settled that where there is a conflict of evidence as to whether a confession is or is not voluntary, if the Court decides that it is admissible, the question is left with the jury with the direction that they should reject the confession if upon the whole evidence they are satisfied it was not the voluntary act of the defendant. (*Wilson v. U. S.*, 16 S. Ct.

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[2]See also: *Shores v. U.S.*, 174 F. (2d) 838, 8 Cir., and *Hale v. U.S.*, 25 F. 430, 438, 8 Cir., 1928.

895, 40 L. Ed. 1090; *U. S. v. Carignan,* 96 L. Ed. 57; *Hale v. U. S.,* 25 F. (2d) 430, 8 Cir., 1928; *U. S. v. Lustcz,* 163 F. 85, 89, 2 Cir., 1947; *Shores v. U. S.,* 174 F. (2d) 838, 8 Cir., 1949.)

This rule may be restated as follows:

> "But when it becomes a question of fact whether or not the confession or admission was voluntary the same is admissible in evidence and the jury is to determine the fact what credit they will give the statement made."
>
> *U. S. v. Appenheim,* 228 F. 220, 232 D. Ct. N.D. N.Y. 1915.

How can a jury determine what credibility should be attached to a proffered alleged confession, admitted into evidence, unless it also be given the opportunity of hearing the evidence of the circumstances surrounding the taking thereof, from the lips of a defendant who is ready to take the stand for that purpose?

III. THE COURT OF APPEALS ERRED IN RULING THAT A JUDGMENT OF CONVICTION OF THE OFFENSE OF EMBEZZLING, STEALING, PURLOINING AND CONVERTING IS A VALID JUDGMENT.

Petitioner was adjudged guilty of the offense of embezzling, stealing, purloining *and* converting to his own use certain government property.

Evidence was adduced as to the removal of certain diesel engine parts. Only one transaction and taking and subject matter are involved.

We will concede that under the indictment petitioner could have been found guilty of any one of the offenses proscribed in Section 641, Title 18, U.S.C.[3]

But the federal statute makes several offenses crimes against the United States. And it is axiomatic that a person cannot be convicted of mutually inconsistent offenses dealing with the same subject matter and the same transaction. Such a verdict and judgment must fall as being a nullity. It is a jurisdictional matter which can properly be raised at any time.

This point was not urged before the trial Court.

But it was made a point on appeal and the Court of Appeals did consider and rule on the same. (R. 222.)

The Court of Appeals misconstrued and brushed aside this point as simply being an objection to the indictment as being duplicitous.

The point is of greater weight and substance, however. It goes to jurisdiction, and challenges the effect of the entire proceedings of the trial Court.

The jury returned a verdict of "guilty as charged". (R. 4.) This verdict was duly excepted to as being contrary to law and the evidence. (R. 208.)

In the case of *Bernhardt v. U. S.*, 169 F. (2d) 983, 6 Cir., 1948, the appellant was convicted of violating the

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[3]Section 641, Title 18, USC, reads in part as follows:
"Whoever embezzles, steals, purloins, *or* knowingly converts to his use or the use of another, or without authority, sells, conveys, or disposes of any record, voucher, money, or thing of value of the United States or of any department or agency thereof, or any property made or being made under contract for the United States or any department or agency thereof; or * * * etc." (Italics added.)

particular section in question. (Section 641.) Title 18, U.S.C. There, as in this instant case, appellants were charged with stealing, embezzling, or knowingly applying to their own use property furnished for use of the military or naval service of the United States. The Court held that the second information charging both theft and embezzlement

> "are inconsistent crimes, for embezzlement presupposes lawful possession and theft does not. They are, however, defined in the statute and alleged in the information in the alternative and while appellants could not have been convicted on both they could have been convicted of one or the other".

It is respectfully submitted that the verdict, judgment and sentence are a nullity in that petitioner was found and adjudged guilty of several inconsistent crimes, to-wit: stealing and embezzling, which is clearly erroneous in law.

The case of *Crain v. United States, supra,* cited in the opinion of the Court of Appeals is not a case in point. For there the offenses relate to different grades of the *same* offense and not to *inconsistent* crimes.

The issue can be reduced to this simple point: there is no such offense as being guilty of embezzling, stealing, purloining *and* converting one item of government property relating to the same transaction.

Nothing could be clearer.

Moreover, all the evidence in the case dealt only with theft—but petitioner has been adjudged guilty of theft, embezzlement, purloining and conversion.

No man should be required to go through life bearing the stigma of penalties of conviction of several felonies, where as a matter of law and fact, he has only been guilty of one offense, *if any.*

Dated, Honolulu, Territory of Hawaii,
June 25, 1952.

Respectfully submitted,
HYMAN M. GREENSTEIN,
Attorney for Petitioner.

(Appendix Follows.)

Appendix

Outside the presence of the jury testimony was given relative to the voluntary or involuntary aspect of the taking of an alleged confession.

Thereafter the following transpired:

"Mr. Greenstein. And do we have the privilege of producing the same evidence before the jury, I take it, in the event the ruling is adverse to our motion to exclude?

The Court. No.

Mr. Greenstein. It is your Honor's ruling that we cannot produce the defendant for the limited purpose as to the voluntary aspects before the jury?

The Court. Well, if you do that we have to go through this whole thing over again.

Mr. Greenstein. Well, my understanding of the procedure is that this comes up once by way of preliminary matter for the Court to decide, and we have the same opportunity in the event that ruling is adverse to present the same thing before the jury relative to the limited question.

The Court. No. That is new to me. * * *

Mr. Greenstein. We object, if the Court please, on the ground that it has not been affirmatively shown that this purports to be, that this purported document, alleged admission or confession, was a voluntary act of the defendant, and specifically request to present evidence before the jury relative to the taking

of the statement and the voluntary aspects thereof before it can be introduced as a matter of evidence.

The Court. That matter was submitted to the Court on a motion to suppress any written statement signed by the defendant, and has been overruled and disposed of.

Mr. Greenstein. May we state for the record that it is the understanding of counsel that matters of this type may be approached twice. The preliminary question of the admissibility of a purported confession is first a matter for the Judge preliminarily. And if that fails, it is again a matter for the trier of the facts, the jury. We think it is the established rule of Federal law that a jury has a right even if the Judge accepts into evidence alleged confessions or rejects the same, if the jury is not convinced beyond a reasonable doubt that it was a free and voluntary act of the defendant——

The Court. *You may, of course, put the defendant on the stand as a witness, but it would be for all purposes——*

Mr. Greenstein. In connection with that point and in view of the Court's remarks, we should like to state by way of offer of proof relative to the motion that we have made that we would offer to put the defendant on only for the limited purpose of inquiring into the voluntary aspect of the taking of the statement. We take it that the Court would deny us that privilege?

The Court. It is not necessary to rule on that at the present time. We haven't approached that. Proceed.

Mr. Ingman. That is an offer of this in evidence, your Honor. I take it it has been received in evidence.

The Court. Received in evidence.

The Clerk. Plaintiff's Exhibit 'D'." (R. 168-171.) (Italics added.)

After the government rested the following transpired:

"Mr. Greenstein. If the Court please, we ask leave of Court to place the defendant on the stand for the limited purpose of producing testimony as to the voluntary aspect of the taking of the confession admitted into evidence herein.

The Court. Well, you have had him on the stand.

Mr. Greenstein. We have had him on the stand outside the presence of the jury and respectfully submit that the question of the admissibility of the confession is a dual situation; one, preliminary for the Court; and, secondly, that the jury is to be the final arbiter of whether or not in point of fact a confession should be considered by it at all. We submit that according to the rule and practice in most jurisdictions the matter comes up in the manner and form that we are attempting to present it. First, that the question is presented outside of the presence of the jury before the Court in the first instance, and notwithstanding the admission into evidence of the purported confession by the Court, the defendant, as we understand the rule, is entitled to present evidence for

consideration of the jury with respect to the same point.

Now, with the leave of Court we should like to refer to some authorities on the proposition. The leading case, U. S. case on this proposition, seems to be *Wilson v. U. S.*, decided, cited in A.L.R., in 162 U. S., on page 613.

The Court. Which, A.L.R. or U.S. 162?

Mr. Greenstein. U.S. 162, 613:

> 'When there is a conflict of evidence as to whether a confession is or is not voluntary, if the court decides that it is admissible, the question may be left to the jury, with the direction that they should reject it if, upon the whole evidence, they are satisfied that it was not the voluntary act of the defendant.'

I might say that this case has been cited by approval since that day. This is an early case, in 1896. And several Federal cases are cited in 85 A.L.R. page 900: the Oppenheim case, 228 Federal; the Litkofsky case, 9 Federal 2nd, 877. The proposition seems to be clearly established that the jury is the final arbiter of the admissibility of the confession. Now, if this is so, then the same privilege which was afforded the defendant earlier outside of the presence of the jury must of necessity be afforded to him again this afternoon. Now, it might well be that that takes time. That is just one of those things. It is a peculiarity in the law where, in order to give a defendant a full protection within the meaning and contemplation of our Constitution, rules

of procedure and laws, that the courts have done that —and, as a matter of fact, while I have not had this same problem arise in this Federal Court, it is a matter which we have done both ways, both excusing and not excusing the jury in the Territorial Court. It seems to be standard practice. We might have this morning or even started last night to put on the evidence which we did, and I am sure, quite sure, the authorities would bear us out that, notwithstanding this Honorable Court might have admitted the confession, we would still under the authorities be entitled to the instructions to the effect that if from the evidence before them the jury was not satisfied beyond a reasonable doubt that the confession introduced was in point of fact a free and voluntary act of the defendant, given freely without inducement of hope or through fear, then they can disregard same.

The case of *Pierce v. Stay,* a Florida case, 196 Southern, 685, where the confession was admitted by the court upon evidence taken outside of the presence of the jury. And here is an Oklahoma case. These are collected in the Dicennial Digest of Criminal Law, Volume 13. The key number is 531(4). And in this Oklahoma case:

> 'The Court is entitled to have evidence as to the manner in which the confession was obtained * * * for the purpose of enabling the jury to judge its weight and value as evidence.'

And another case here, which I believe is directly on all fours with the point we are contending for, your Honor:

> 'If the trial court determines that a confession is admissible, the defendant is entitled to have the evidence in regard to the circumstances under which it was made introduced for the purpose of enabling the jury to determine what weight and value should be given it as evidence, and the jury may disregard it if they are not satisfied it was voluntarily made.'

And a recent case in 110 Federal 2nd was a case in which the procedure was just as we are asking here, the case of *Wagner v. U. S.*, 110 Federal 2nd; certiorari denied. The district judge, after first hearing testimony out of the presence of the jury, and having ruled the confession voluntary and admissible, 'is entitled to submit the same question to the jury'.

We respectfully submit that the weight of authority is clearly in line with the procedure for which we are asking.

The Court. I don't agree with you. The question as to admissibility on the grounds that you alleged is a question to be heard by the Court, and the question of law on that basis. The jury is skilled in the matter of determining acts and the value of them. The question of the admissibility is rather a technical one now. Your motion was to suppress the introduction of the statement signed by the defendant. And after a lengthy and full hearing in which the defendant was on the stand and you had full opportunity to cross-examine the investigator who took the statement, who put the statement in writing, the Court determined

and judged that the written statement was admissible, not subject to suppression on the grounds you set out.

Now, what the jury may consider. The confession is already before the jury. What the jury may consider as to the value of that written, signed statement *—of course, if you want to put the defendant on, that is within your rights. But when you put the defendant on, it is not for a special purpose, if you should, but for all purposes of examination. If you want to proceed on that basis, you may, of course, do so.*

Mr. Greenstein. For the purpose of the record I should like to correct the Court on one point. Our motion was not to suppress. There is a difference between the motion to suppress and a motion to exclude. Our motion was a motion to exclude from being introduced into evidence or being tantamount to an objection into evidence of an improper piece of evidence. We should like a ruling on our request for leave to permit the defendant to take the stand for the limited purpose of giving testimony as to the voluntary aspect of the taking of the confession into evidence.

The Court. I have already ruled on it.

Mr. Greenstein. May we take an exception? And in which case the defendant will rest." (R. 194-199.) (Italics added.)

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In the Supreme Court of the United States

OCTOBER TERM, 1952

No. 159

FREDERICK CHARLES WITT, *Petitioner*

v.

UNITED STATES OF AMERICA

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Appeals (R. 220-222) is reported at 196 F. 2d 285.

JURISDICTION

The judgment of the Court of Appeals was entered on April 29, 1952 (R. 223). On May 28, 1952, the time within which to file a petition for a writ of certiorari was extended by order of Mr. Justice Douglas to and including June 20, 1952. On June 16, 1952, this period was extended by Chief Justice Vinson to and including June 28, 1952. The petition was filed on June 25, 1952. The jurisdiction

of this Court is invoked under 28 U.S.C. 1254(1). See also Rules 37(b)(2) and 45(a), F. R. Crim. P.

QUESTIONS PRESENTED

1. Whether the trial court was correct in ruling that, if petitioner took the stand before the jury, he would be open to cross-examination for impeachment purposes, and could not have his testimony limited to the voluntariness of his confession.

2. Whether the trial court's judgment, reciting that petitioner was convicted of the inconsistent offenses of theft and embezzling, as charged in the indictment, prejudiced petitioner where only the issue of theft was submitted to the jury.

STATEMENT

On March 14, 1951, an indictment was returned in the United States District Court for the District of Hawaii, charging that petitioner did "knowingly, wilfully, unlawfully and feloniously embezzle, steal, purloin and knowingly convert to his use and the use of another," certain Government property of the value of $321.02, in violation of 18 U.S.C. 641 (R. 3).[1] Petitioner was tried be-

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[1] 18 U.S.C. 641 provides in pertinent part:

> Whoever embezzles, steals, purloins, or knowingly converts to his use or the use of another, * * * any record, voucher, money, or thing of value of the United States * * *
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> * * * * *
>
> Shall be fined not more than $10,000 or imprisoned not more than ten years, or both; * * *.

fore a jury and found guilty "as charged" (R. 4). Imposition of sentence was suspended, and petitioner was placed on probation for two years, and fined the sum of $500 (R. 5-6). On appeal, the judgment was affirmed (R. 217-223).

The evidence adduced at the trial may be summarized as follows:

On December 26, 1950, the date of the alleged offense, petitioner was employed at the Pearl Harbor Navy Yard as a teletype mechanic (R. 99, 135-136). Witness Quon (R. 98) testified that on the date in question, petitioner, while driving the Navy service truck which petitioner regularly drove in the course of his work, picked him up inside the yard and then drove outside the yard to the rear of the house of one Cavallo. Petitioner asked Quon to help unload certain boxes and equipment, which Quon identified in court. (R. 98-104.) Three members of the Naval Base police testified that they recovered certain equipment, appearing to be diesel engine parts, from Cavallo's private automobile parked in the rear of his home. All three witnesses identified the equipment in court as being the same as that recovered by them. (R. 27-41, 42-44, 44-61.) Witness Jo Ann Cavallo testified that she was present at her residence when petitioner and Quon arrived in the navy truck and unloaded the parts into her husband's private car (R. 96-98). Other witnesses identified the recovered property by numbers and marks as having

come from Shop 38, Pearl Harbor Navy Yard (R. 62-84, 85-96) and testified as to the value of the property (R. 92-93).

The Government sought to introduce into evidence petitioner's alleged confession to F.B.I. agent Weiskirch (R. 104, 107). Petitioner objected and requested a hearing on the question of the voluntariness of the confession outside the jury's presence (R. 107-108).[2] Thereupon the jury was dismissed (R. 108) and agent Weiskirch (R. 104-134, 156-194) took the stand and testified as follows:

On December 27, 1950, he proceeded to the Pearl Harbor Naval Base where he contacted Captain Festerling of the Base Naval Police for the purposes of conducting an investigation concerning the alleged theft of certain Government property (R. 104). Weiskirch identified petitioner in court (R. 107) as the man who came to Captain Festerling's office at the police department at approximately 11:00 a.m. Thereafter, the agent interviewed petitioner until 12:45 p.m., during which time petitioner made certain admissions to him. Before beginning the interview, the agent advised petitioner that he need not make any statement whatsoever; that whatever he

[2] Petitioner's other ground of objection, that the prosecution had failed to establish the corpus delicti in that there was no evidence of a taking, was overruled by the trial court (R. 113).

said could be used in court; and that he was entitled to be represented by counsel (R. 107, 115).

On cross-examination, Weiskirch flatly denied that he had made any promises to petitioner or made any statements concerning probation. He stated that petitioner's attitude during the interview was "humble", and "quite apologetic" (R. 129) and that, to his knowledge, petitioner understood the admonition concerning his constitutional right not to incriminate himself (R. 124-132).

Petitioner then took the stand and testified that (R. 135-156) on the morning of December 27, 1950, around 8:00 a.m., he proceeded, as requested, to the police station inside the Naval Yard, where he waited approximately an hour and one-half before seeing Captain Festerling. He made no incriminating statements to Festerling during the one-half hour interview with him. After the lapse of an hour and a half, during which he remained alone, he was escorted into an office where agent Weiskirch identified himself and asked petitioner to repeat the story he had earlier told to Captain Festerling (R. 143-144). Petitioner stated that Weiskirch told him that he wanted the right answers and that if he, petitioner, did not give them, the F.B.I. would find out anyway (R. 145). After the lunch hour, the interview was resumed. Petitioner testified that he made the incriminating statements after Weiskirch told him that he could not have a lawyer, and that if he did not talk, he would be locked up for at least six months (R.

148). Petitioner alleged that he was nervous, trembling and "really good and scared" (R. 148). On cross-examination, petitioner admitted that before the luncheon recess, Weiskirch had informed him that he could have a lawyer if he wanted one (R. 149), but denied that he had been told that he need not make a statement (R. 150). Petitioner maintained that he thought he was restricted during the lunch hour because he was told to "stand by" by Weiskirch, although he proceeded unaccompanied to a dock near the police station where he remained until 1:30 p.m., when he returned to the station (R. 150-154).

After the jury's return to the courtroom, the court denied petitioner's motion to suppress the confession (R. 169). The statement was then read by agent Weiskirch (R. 172-175). In it, petitioner admitted that on December 26, 1950, he drove the Navy truck assigned to him to shop 38 where he assisted in loading the truck with various pieces of navy equipment, and that later, with Quon, he drove out of the Navy Yard to Cavallo's residence where the parts were unloaded into the Cavallo car. Petitioner also stated (R. 174), "I was panicky and wanted to get rid of this stolen Government property which I had carried away and was desperate for a place to dispose of it." Counsel for petitioner again cross-examined Weiskirch in relation to the matters propounded in the hearing before the court (R. 176-191).

After the Government rested its case, petitioner's counsel sought to place him on the stand "for the limited purpose of producing testimony as to the voluntary aspect of the taking of the confession admitted into evidence herein" (R. 194).

The court stated (R. 198):

> * * * of course, if you want to put the defendant on, that is within your rights. But when you put the defendant on, it is not for a special purpose, if you should, but for all purposes of examination. If you want to proceed on that basis, you may, of course, do so.

In its charge to the jury, the trial court instructed (R. 202):

> Notwithstanding the admission into evidence by the Court of this document it is up to you, the jury, to decide whether to accept or reject the truth of the same.

Petitioner did not take the stand before the jury.

ARGUMENT

1. Petitioner contends here, as in his motion for new trial (R. 8) and in the court below (R. 213-214), that he was denied the right to testify in his own behalf before the jury by the trial court's "ruling in effect that a defendant in a criminal trial cannot take the stand in the presence of the jury for the express limited purpose of testifying as to the involuntary aspect of the taking of a con-

fession" (Pet. 14). This argument is wholly without merit.

As the Court of Appeals for the Ninth Circuit noted in its opinion below (R. 221-222), a reading of the record clearly establishes that the trial court went no further than to inform counsel that, if petitioner took the stand, as was his right, he would be subject to cross-examination. This warning was clearly correct. It is well established that, when an accused offers himself as a witness, his credibility may be impeached in the same manner and to the same extent as any other witness. *Sawyer* v. *United States,* 202 U.S. 150, 165-166; *United States* v. *Tandaric,* 152 F. 2d 3 (C.A. 7), certiorari denied, 327 U.S. 786; *Banning* v. *United States,* 130 F. 2d 330 (C.A. 6), certiorari denied, 317 U.S. 695; *Simon* v. *United States,* 123 F. 2d 80 (C.A. 4), certiorari denied, 314 U.S. 694. Petitioner sought to limit his testimony in a manner not permitted by our criminal procedure, and the trial court was protecting his rights in informing him of the consequences of his contemplated action.

Clearly the court's instruction (R. 198) placed with the jury the ultimate determination of the question of the voluntary nature of the confession. And the trial court's finding that the confession was a voluntary one was fully supported by the evidence. (R. 104-134, 156-170).

2. Petitioner also contends (Pet. 17-20) that the verdict, judgment and sentence are a nullity in that he was erroneously found guilty of the mutually inconsistent offenses of embezzlement and theft dealing with the same subject matter and the same transaction. It is clear, however, that, while the indictment and judgment could have been more artistically drawn, the defect did not affect petitioner's substantial rights and did not, as he claims, vitiate the jurisdiction of the District Court. *Crain* v. *United States*, 162 U.S. 625, 634-636. Petitioner was in no way misled by the charge of the indictment. Indeed, he waived the reading of the indictment at arraignment, "consenting that the charge be entered in the words thereof" (R. 15), and concededly never raised the point before the trial court (Pet. 18). Thus, it is apparent that he was fully apprised of the nature of the charge and adequately prepared to defend himself at trial.

The trial judge's charge to the jury was clearly framed with reference to theft. The jury was admonished that in order to convict petitioner, all of the elements thereof must be found present in the evidence (R. 203-204). And there is no question, as petitioner concedes (Pet. 18), as to the sufficiency of the evidence to support the verdict. Petitioner made no objection to the form of the verdict at the time when it could have been changed, the only objection being the general one that it was "contrary to the law and contrary to the evi-

dence" (R. 208). Nor was the point raised in his motion for new trial (R. 6-9).

At most, then, it appears that whatever technical defect there may be in the judgment finding petitioner "guilty as charged and convicted" of stealing and embezzling (R. 5), petitioner's substantial rights were not affected and the defect amounted to harmless error at most. See Rule 52, F. R. Crim. P. Indeed, as to protection from being placed in double jeopardy, petitioner obtained wider protection than if the judgment had been phrased solely in terms of theft. See *Crain* v. *United States, supra,* at p. 636. Certainly, no question affecting jurisdiction is presented.

CONCLUSION

For the foregoing reasons, it is respectfully submitted that the petition for a writ of certiorari should be denied.

PHILIP B. PERLMAN,
Solicitor General.

JAMES M. MCINERNEY,
Assistant Attorney General.

BEATRICE ROSENBERG,

JAMES T. KELLS,
Attorneys.

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